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# LOOSENING THE ADMINISTRATIVE HANDCUFFS: DISCRETION AND RESPONSIBILITY UNDER THE GUIDELINES

*John M. Walker, Jr.\**

## INTRODUCTION

Prior to the advent of the Federal Sentencing Guidelines ("Guidelines"),<sup>1</sup> trial judges had nearly unfettered discretion in deciding whether and for how long a defendant should be incarcerated.<sup>2</sup> Critics pointed to vast sentencing disparities and charged that this system was "lawless."<sup>3</sup> The Guidelines were intended to respond to these concerns. Congress sought to create a rational sentencing system which would structure sentencing decisions and reduce inequalities and uncertainties.<sup>4</sup> As promulgated, however, the Guidelines have provoked intense opposition and outcry from the bar and, particularly, from federal judges.<sup>5</sup>

The Guidelines have been described as "administrative handcuffs that are applied to judges."<sup>6</sup> According to one judge,

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\* United States Circuit Judge for the Second Circuit. The author gratefully acknowledges the assistance of Rachel D. Godsil, Esq. and Lynn K. Neuner, Esq. in the preparation of this Article.

<sup>1</sup> See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1992) [hereinafter U.S.S.G.].

<sup>2</sup> Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2044 (1992).

<sup>3</sup> *Id.*; see, e.g., S. REP. NO. 225, 98th Cong., 2d Sess. 37-50 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3220-33; MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 118-24 (1972).

<sup>4</sup> U.S.S.G. ch. 1, pt. A, intro. cmt., at 1.2.

<sup>5</sup> See, e.g., Joseph Treaster, *Two Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993, at A1; Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2; Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357 (1992); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 135-44 (1990).

<sup>6</sup> Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1697 (1992).

the Guidelines wiped away the human element from the sentencing process, and replaced it with "the clean, sharp edges of a sentencing slide rule."<sup>7</sup> According to another, "judges are becoming rubber-stamp bureaucrats" and "judicial accountants."<sup>8</sup> These colorful metaphors no doubt reflect the frustrations of the district judges who must operate under the Guidelines' regime, but I believe they overstate the situation. In this survey of recent Second Circuit Guidelines decisions, I hope to assuage the concern that, at least in this circuit,<sup>9</sup> the Guidelines have eliminated the human element from the sentencing process.<sup>10</sup>

In a number of Guidelines cases decided in the last term,<sup>11</sup> our court confronted and sought to dispel the widespread but incorrect notion that the Guidelines preclude consideration of the defendant's character. And, to that effect, we elucidated the framework and circumstances under which

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<sup>7</sup> Cabranes, *supra* note 5, at 2.

<sup>8</sup> Weinstein, *supra* note 5, at 364.

<sup>9</sup> Other circuits have also addressed this issue. *See, e.g.*, *United States v. Hooker*, 997 F.2d 67 (5th Cir. 1993); *United States v. Jones*, 997 F.2d 1475 (D.C. Cir. 1993); *United States v. Nichols*, 979 F.2d 402 (6th Cir. 1992); *United States v. Dillard*, 978 F.2d 716 (9th Cir. 1992); *United States v. Wise*, 976 F.2d 393 (8th Cir. 1992); *United States v. Fox*, 889 F.2d 357 (1st Cir. 1989); *United States v. Baylin*, 696 F.2d 1030 (3d Cir. 1982).

<sup>10</sup> This is by no means the sole focus of judges' opposition to the Guidelines. A number of judges have voiced concern that prosecutors have gained the discretion lost by judges, since the decision of what charges to bring determines the initial Guidelines range. *See* Cabranes, *supra* note 5, at 13. *See generally* Ilene Nagel & Stephen Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992). A second significant concern is that, in drug cases, the sentencing range is determined principally by the amount of drugs at issue rather than by the defendant's role in the crime. Thus, a low-level drug "mule" carrying a large amount of drugs may receive the same or even a higher sentence than the dealer for whom he or she works. *See id.*; *see also* Stephen Labaton, *Reno Moving to Reverse Stiff Sentencing Rule for Minor Drug Crimes*, N.Y. TIMES, May 5, 1993, at A19 ("it's crazy that a convicted killer can be kicked out of prison to make room for a drug mule"). Finally, concerns about sentencing under the Guidelines have been conflated with the concurrent proliferation of mandatory minimum penalty statutes enacted by Congress, resulting in sentences which many judges believe are draconian, conducive to sentencing disparity and, when applied to non-violent offenders, wasteful of scarce prison space. *See generally* Nagel & Schulhofer, *supra*. These issues are beyond the scope of this Article, but have been thoughtfully addressed elsewhere. *See, e.g.*, Freed, *supra* note 6.

<sup>11</sup> *See, e.g.*, *United States v. Merritt*, 988 F.2d 1298 (2d Cir. 1993); *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991).

district courts are authorized to depart from the Guidelines-prescribed sentencing range. Our cases make clear that the Guidelines have not transformed judges into computers confined to connecting dots on a grid when fashioning a sentence. Rather, judges retain the discretion, and indeed are required, to consider each defendant as an individual and to fashion each sentence accordingly.

Although Congress and the Guidelines have not disenfranchised district judges to the extent many had feared, the Guidelines have imposed new responsibilities on district courts. Prior to the promulgation of the Guidelines, district courts' sentencing decisions were almost completely discretionary; district courts were not required to explain their sentences and appellate review was virtually non-existent.<sup>12</sup> By contrast, sentences imposed under the Guidelines are subject to appellate review and district courts are required to make specific findings on a number of issues and to explain and support their decisions.<sup>13</sup> These requirements help to ensure that district courts are applying the Guidelines correctly and that an adequate record exists for the reviewing court.

For the uninitiated, Part I of this survey gives a brief overview of the Guidelines. Part II then reviews recent Second Circuit decisions that recognize district courts' sentencing discretion and present circumstances in which district courts are warranted in adjusting sentences outside of prescribed Guidelines ranges due to offender as well as offense characteristics. Finally, Part III examines cases that spell out circumstances in which district courts must make specific findings explaining their sentencing decisions.

## I. THE FEDERAL SENTENCING GUIDELINES IN A NUTSHELL

According to one commentator, the Guidelines "approach in complexity and impenetrability the Internal Revenue Code."<sup>14</sup> To understand the criticisms as well as the support for the Guidelines, it is necessary to have a basic appreciation of how they work in practice. It will be helpful, therefore, to

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<sup>12</sup> See Freed, *supra* note 6, at 1688.

<sup>13</sup> See *infra* notes 95-130 and accompanying text.

<sup>14</sup> Cabranes, *supra* note 5, at 6.

describe briefly the statutory framework undergirding the Guidelines and the steps required of a judge in applying them.

### A. *The Sentencing Reform Act*

The Guidelines are the final step in a larger statutory scheme, the Sentencing Reform Act of 1984 ("SRA").<sup>15</sup> In passing the SRA, Congress announced its primary objectives to be honesty in sentencing (which it proposed to achieve in major part by eliminating parole); uniformity in sentencing for similar offenses and similar offenders; and proportionality of sentencing for conduct of differing severity.<sup>16</sup>

Under the prior parole regime, the United States Parole Commission periodically reviewed sentences after the fact with a view toward determining when a defendant should be released.<sup>17</sup> Defendants typically were eligible for parole after serving a third of the sentence imposed. This system resulted in a measure of public cynicism and reduced the accountability of those within the criminal justice system.<sup>18</sup> In place of parole, the SRA instituted "real time" sentencing, under which a defendant serves the sentence actually received except for relatively minor "good time" credits.<sup>19</sup>

To address the disparity in imposed sentences, the SRA created the United States Sentencing Commission ("Commission") and directed it to devise sentencing guidelines for federal judges that manifested Congressional objectives.<sup>20</sup> The SRA provided for the Commission to be composed of seven members, including at least three federal judges. The Attorney General and the chairman of the U.S. Parole Commission were added as *ex officio*, nonvoting members.<sup>21</sup> The Commission

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<sup>15</sup> The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86 (1988), and 28 U.S.C. §§ 991-98 (1988)).

<sup>16</sup> See Freed, *supra* note 6, at 1689.

<sup>17</sup> *Id.*

<sup>18</sup> Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 5 n.23 (1991).

<sup>19</sup> See 18 U.S.C. § 3624(b) (1988).

<sup>20</sup> The sentencing objectives of Congress are largely set forth in 18 U.S.C. § 3553(a) and 28 U.S.C. § 994(c) and (d).

<sup>21</sup> 28 U.S.C. § 991(a) (1988); 18 U.S.C. § 3551 (1988) (note).

promulgated the first Guidelines in the United States Sentencing Commission *Guidelines Manual* ("Manual"), with an effective date of November 1, 1987, and has reissued amended Guidelines on the first of November each following year.<sup>22</sup>

The SRA also provided for appellate review of sentences in cases where: (1) a sentence is imposed in violation of law; (2) a sentence is imposed as a result of an incorrect application of the Guidelines; (3) a court deviates from the sentencing range prescribed by the Guidelines based on its power to depart; and (4) a "plainly unreasonable" sentence is imposed for an offense for which there is no guideline.<sup>23</sup>

### B. *Sentencing Under the Guidelines*

Before the district court sentences a convicted defendant under the Guidelines, a probation officer conducts an investigation and presents his or her findings to the district court in a presentence report, except in the rare case where the court finds that there is sufficient information in the record to allow "the meaningful exercise of sentencing authority."<sup>24</sup> Both the defendant and the government are permitted to respond to the presentence report and to note issues in dispute.<sup>25</sup> In resolving disputes over factors material to the sentencing determination, the sentencing court may consider any relevant information, even if that information would be inadmissible at trial under the Federal Rules of Evidence. As long as the information "has sufficient indicia of reliability to support its probable accuracy," it may be considered at the sentencing phase.<sup>26</sup> Once the district court has resolved the disputed factors and given the parties an opportunity to object,<sup>27</sup> the court follows steps necessary to determine the sentencing range.

A district court judge's objective at this stage is to locate

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<sup>22</sup> For a discussion of the process by which the Commission formulates the Guidelines, see Freed, *supra* note 6, at 1693-96.

<sup>23</sup> 18 U.S.C. § 3742(a) (1988); see Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 629 (1992).

<sup>24</sup> U.S.S.G. § 6A1.1.

<sup>25</sup> *Id.* § 6A1.2.

<sup>26</sup> *Id.* § 6A1.3.

<sup>27</sup> *Id.*

the appropriate sentencing range on a sentencing grid. The grid assigns ranges at the intersection of a vertical column of forty-three offense levels and a horizontal axis of six criminal history categories. The judge then sentences the defendant within that range unless he or she determines that departure from the range is warranted by "aggravating or mitigating circumstances of a kind or to a degree . . . not taken into consideration by the Sentencing Commission."<sup>28</sup>

The offense level that determines the appropriate horizontal axis along the vertical column is derived from a base offense level tied to the charged offense of conviction and then adjusted for factors relating to the defendant's behavior at the time of, and subsequent to, its commission. To determine the defendant's base offense level, the judge first finds the Guidelines provision that corresponds to the criminal statute of conviction. The base offense level set out in Chapter Two of the *Manual* is a function of the perceived seriousness of the offense. For example, a starting offense level for drug cases depends largely upon the quantity of drugs attributed to the defendant.<sup>29</sup> Similarly, for offenses involving fraud or deceit, the base offense level reflects the amount of money at issue.<sup>30</sup> When sentencing a defendant for conduct relating to racketeering, the base offense level is the greater of the offense level applicable to the underlying racketeering activity or level 19 (which, without further adjustments and for a first offender, would permit sentencing within a range of thirty to thirty-seven months).<sup>31</sup>

After locating the base offense level, the judge must then adjust the level upward or downward based upon specific offense characteristics. This includes such factors as the use of a firearm during the commission of the crime, whether death or serious injury resulted from the violation of the statute of conviction, and the amount of planning the crime entailed.<sup>32</sup> Additional adjustments to the base offense level may result upon consideration of "(1) the victim's characteristics, (2) the

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<sup>28</sup> 18 U.S.C. § 3553(b) (1988).

<sup>29</sup> U.S.S.G. § 2D1.1(c) (Drug Quantity Table).

<sup>30</sup> *Id.* § 2F1.1.

<sup>31</sup> *Id.* § 2E1.1.

<sup>32</sup> See, e.g., *id.* § 2D1.1.

defendant's role in the offense, (3) whether the defendant obstructed justice, (4) the incidence of multiple counts,<sup>33</sup> and (5) whether the defendant accepted responsibility for his or her actions."<sup>34</sup>

Finally, having settled upon the appropriate horizontal axis, the judge determines one of six criminal history categories along that axis based upon the defendant's past conviction record. As part of this process, the judge considers whether the defendant's sentence must be enhanced by career offender Guideline provisions<sup>35</sup> which, in certain circumstances, provide for sentence enhancements for a defendant who has two or more prior convictions<sup>36</sup> or has committed the offense as part of his or her "criminal livelihood."<sup>37</sup>

Having arrived at the appropriate location on the grid and, thus, the applicable sentencing range, the judge is required to consider a number of factors before determining the precise sentence to be imposed: the nature of the offense and the history and characteristics of the defendant, deterrence, public protection, the applicable sentencing range, policy statements issued by the Commission, and the need to avoid unwarranted sentencing disparities.<sup>38</sup> The judge then either chooses a sentence within the range or decides to depart from it. It is the

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<sup>33</sup> The Guidelines provide specific rules for increasing punishment for multi-count convictions. *See id.*, ch. 3, pt. D.

<sup>34</sup> Selya & Kipp, *supra* note 18, at 7 (footnotes added).

<sup>35</sup> *See* 28 U.S.C. § 994(h) (1988) (requiring the Commission to ensure that "career offenders" receive a sentence of imprisonment at or near the maximum term authorized by statute). The statute is implemented in Guidelines § 4B1.1, cmt. (backg'd). *See also* 18 U.S.C. § 924(e) (1988). The Armed Career Criminal statute is implemented in Guidelines § 4B1.4.

<sup>36</sup> For example, a defendant's sentence is enhanced under the "career offender" provisions if he or she committed a "felony that is either a crime of violence or a controlled substance offense," and "has had at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1. Guidelines § 4B1.2 provides in part that:

(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

<sup>37</sup> U.S.S.G. § 4B1.3, cmt. (backg'd) (implementing 28 U.S.C. § 994(i)(2) (1988)).

<sup>38</sup> *Id.*



latter decision, whether or not to depart and, if so, how far, which is the focus of Part II.

## II. THE NATURE OF THE DISTRICT COURT SENTENCING DISCRETION

Critics contend that the Guidelines virtually abolish consideration of the defendant's character and, instead, require judges to fashion sentences based largely upon the offense and not the offender. This view is widely held by district judges and tends to be self-fulfilling. The unfortunate result is that judges are inadvertently failing to carry out the congressional mandate to consider "the nature and circumstances of the offense *and the history and characteristics of the defendant*"<sup>39</sup> when imposing a sentence.

Several defendant characteristics must be considered in reaching the range assigned by the Guidelines, including the defendant's acceptance of responsibility,<sup>40</sup> criminal history,<sup>41</sup> and dependance on crime for a livelihood.<sup>42</sup> But the Commission determined that a single set of guidelines could not accommodate the panoply of imaginable human conduct, and, consequently authorized judges to depart from the Guidelines range if the defendant or the offense diverges in relevant ways from the "heartland" of typical cases foreseen and accounted for by the Guidelines.<sup>43</sup> A judge is therefore empowered to consider a defendant's characteristics when evaluating whether to grant a departure—either upward or downward—from the applicable Guidelines range. Our recent decision in *United States v. Merritt*<sup>44</sup> provides a vivid example of a defendant whose character and conduct fall outside of the "heartland" of Guidelines cases, thereby warranting an exercise of judicial discretion to arrive at an appropriate sentence.

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<sup>39</sup> 18 U.S.C. § 3553(a)(1) (1988) (emphasis added).

<sup>40</sup> U.S.S.G. § 3E1.1.

<sup>41</sup> *Id.* §§ 4A1.1-3.

<sup>42</sup> *Id.* § 4B1.3.

<sup>43</sup> *Id.*, intro. pt. 4(b).

<sup>44</sup> 988 F.2d 1298 (2d Cir. 1993).

### A. United States v. Merritt

Merritt and AMG Services, Inc. contracted with the United States Agency for International Development to supply and ship high-quality powdered milk to the Democratic Republic of the Sudan, which was facing a serious food shortage.<sup>45</sup> Merritt instead shipped a cheap "milk replacer," generally used as animal feed, which was not fit for human consumption and had a foul taste and odor.

Merritt was charged in a twelve-count indictment and entered into a plea agreement with the government under which he pleaded guilty to a conspiracy with various fraudulent objectives.<sup>46</sup> In the plea agreement, Merritt agreed to make available prior to sentencing "all personal and corporate financial information requested by the government."<sup>47</sup> Merritt violated this promise by submitting forged documents to the court and by stating falsely that of the \$936,000 he had received, all but \$75,000 had been disbursed to other parties. At the sentencing hearing, the court found Merritt's base offense level to be 16. The court made an upward adjustment of two points for obstruction of justice, and one point for danger to public health. The court then departed upward from the offense level of 19 (thirty to thirty-seven months) to the statutory maximum of sixty months' imprisonment because of Merritt's continued fraudulent scheme to retain the proceeds of his crime.<sup>48</sup>

On appeal, Merritt contended that the district court had no authority to depart upward from the Guidelines range by reason of his concealment of assets and failure to pay restitution. He argued that these issues had been adequately considered by the Commission, and thus that any departure contravened the Guidelines. The Second Circuit, in an opinion written by then-District Judge Pierre Leval of the Southern District of New York (sitting by designation), rejected this narrow conception of the appropriate role of departure. The court held

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<sup>45</sup> *Id.* at 1300.

<sup>46</sup> Count one charged him with "conspiracy to submit false claims to the United States, to defraud the United States in connection with a contract worth in excess of \$1 million, and to commit wire fraud." *Id.* at 1302.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1304-05.

that, notwithstanding the Guidelines' policy statement admonitions that certain offender characteristics are "not ordinarily relevant," in certain circumstances a failure to consider offender characteristics would contravene the statute. Citing 18 U.S.C. section 3553 and 28 U.S.C. section 994, Judge Leval wrote: "The Sentencing Reform Act did not abolish consideration of the character of the defendant in sentencing. In fact, . . . the Act clearly ordered that the characteristics of the defendant were to be a central consideration in the fashioning of a just sentence."<sup>49</sup>

In *Merritt*, we stressed that in carrying out the Congressional mandate to consider defendant characteristics, the Commission left much to district court discretion. Unlike the detailed and specific categories of offense conduct, the treatment of the defendant's character in the Guidelines is quite limited. Congress enumerated a number of specific offender characteristics that the Commission was to consider in establishing categories of defendants, such as age, education, vocational skills, mental and emotional condition, physical condition, previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependance upon crime for a livelihood.<sup>50</sup> However, the Commission chose to incorporate only criminal history,<sup>51</sup> dependance on crime for a livelihood,<sup>52</sup> and acceptance of responsibility<sup>53</sup> specifically into the Guidelines and, in a policy statement, deemed the other characteristics "not *ordinarily* relevant in determining whether a sentence should be outside the [G]uidelines."<sup>54</sup>

Under this formulation, we held in *Merritt* that those characteristics that are not "ordinarily" relevant may nevertheless be considered as a basis for departure when the circumstances fall outside the ordinary case. This inference is supported by the Guidelines' discussion of departures, in which

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<sup>49</sup> *Id.* at 1306-07.

<sup>50</sup> 28 U.S.C. §§ 994(d)(1)-(11) (Supp. IV 1986); see Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 12 (1987).

<sup>51</sup> U.S.S.G. §§ 4A1.1-3.

<sup>52</sup> *Id.* § 4B1.3.

<sup>53</sup> *Id.* § 3E1.1.

<sup>54</sup> *Id.* § 5H1.1-6 (emphasis added).

the Commission asserts that "courts should treat each guideline as 'carving out a "heartland," a set of typical cases' and that, '[w]hen a court finds an atypical case,' that 'significantly differs from the norm, the court may consider whether a departure is warranted.'"<sup>55</sup> Given the infinite variety of human characteristics, it is considerably more difficult to quantify the effect on a sentence of offender characteristics than offense characteristics. Recognizing this to be true, the Commission chose to allow consideration of defendants' characteristics and to authorize district courts to exercise discretion to depart in the appropriate case rather than attempting to prescribe imperative Guidelines calculations for every conceivable set of circumstances.

Applying this framework to the facts of the case in *Merritt*, we held that the defendant's "profound corruption and dishonesty, and his elaborate fraudulent manipulation . . . designed to preserve the huge benefits of his crime" were "not of a kind, or to a degree"<sup>56</sup> adequately considered by the Guidelines and, accordingly, affirmed the district court's decision to depart upward on this basis. Our opinion also noted that Merritt's crime—substituting inconsumable animal feed for powdered milk intended to provide relief to famine victims—was "so heinous and [went] so far beyond the 'heartland' of fraud," as to itself justify upward departure.<sup>57</sup>

## B. *Downward Departures*

As *Merritt* makes plain, the Second Circuit endorses the exercise of judicial discretion in response to Congress's requirement that a district judge consider defendants' individual characteristics.<sup>58</sup> Last term, we affirmed the "traditional role of a district judge in bringing compassion and common sense to the sentencing process," and sought to avoid the danger that in "the tangled wake of the Sentencing Guidelines, . . . district judges will conclude in frustration that this role has been erad-

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<sup>55</sup> *United States v. Merritt*, 988 F.2d 1298, 1309 (2d Cir. 1993) (quoting U.S.S.G. intro. pt. 4(b)).

<sup>56</sup> *Id.* at 1310.

<sup>57</sup> *Id.* at 1312 n.11.

<sup>58</sup> *Id.* at 1312.

icated.<sup>59</sup> This frustration was evidenced by a number of cases in which district judges were under the mistaken belief that they lacked authority to depart.<sup>60</sup> Although ordinarily the failure to depart is not reviewable,<sup>61</sup> we nevertheless remanded these cases to provide the district courts with an opportunity to decide whether to exercise their authority.

For example, we held in *United States v. Mickens*<sup>62</sup> that downward departure may be appropriate when the defendant is a victim of spousal abuse and has maintained a clean record. After a jury trial, Mickens' co-defendant was convicted of conspiracy, money laundering, and tax evasion<sup>63</sup> for playing a minor role in concealing a portion of the criminal proceeds from Mickens' narcotics operation.<sup>64</sup> Because of his perception that "his hands were tied,"<sup>65</sup> the district court judge did not depart downward on the basis of the co-defendant's experience of marital abuse. In an opinion by Judge Frank X. Altimari, we reversed, holding that the circumstances as the co-defendant had portrayed them—a battered woman who paid a high price for unfortunate choices she made while escaping her abusive marriage and who now remains arrest-free, employed, and financially supportive of her child—may warrant a downward departure.<sup>66</sup> We remanded the case to the district judge to make findings of fact and to exercise the discretion that is uniquely his to determine whether a departure was warranted.

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<sup>59</sup> *United States v. Rogers*, 972 F.2d 489, 492 (2d Cir. 1992).

<sup>60</sup> See, e.g., *United States v. Califano*, 978 F.2d 65 (2d Cir. 1992) (per curiam); *United States v. Mickens*, 977 F.2d 69 (2d Cir. 1992); *Rogers*, 972 F.2d at 489.

<sup>61</sup> *United States v. Miller*, 993 F.2d 16, 21 (2d Cir. 1993) (district court's refusal to depart downward is not appealable unless the court mistakenly believed it lacked the authority to do so).

<sup>62</sup> 977 F.2d 69 (2d Cir. 1992).

<sup>63</sup> She was convicted of: (1) conspiring to defraud the United States, in violation of 18 U.S.C. § 371 (1988); (2) money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B) (1988); and (3) evasion of currency reporting requirements, in violation of 31 U.S.C. § 5324(3) (1988). *Mickens*, 977 F.2d at 70.

<sup>64</sup> At the close of trial, the jury requested leniency in sentencing the co-defendant. On the basis of the jury's request, the district court downwardly departed from the Guidelines range of 41-51 months and sentenced her to 18 months. The government appealed and we reversed, holding that the district judge was required to make an independent finding that downward departure was warranted. *Id.* at 73.

<sup>65</sup> *Id.* at 71.

<sup>66</sup> *Id.* at 73.

We have also held that significant efforts at drug rehabilitation provide a permissible basis for downward departure.<sup>67</sup> In *United States v. Maier*, in an opinion authored by Chief Judge Jon O. Newman, we held that, notwithstanding a Guidelines policy statement that "[d]rug or alcohol dependence are not a reason for imposing a sentence below the [G]uidelines,"<sup>68</sup> a basis for departure could be found in the defendant's willingness and dedication to achieve drug rehabilitation since these factors had not been adequately considered by the Commission.<sup>69</sup> In a similar vein, in *United States v. Cotto*, we remanded the case to the district court to consider whether departure for drug rehabilitation was appropriate since, in rejecting defendant's request for such a departure, the district court appeared to blend an exercise of discretion with the mistaken view that a departure would be unlawful.<sup>70</sup>

Other offender characteristics that we have held to provide grounds for departure include extraordinary family circumstances,<sup>71</sup> voluntary surrender and extraordinary acceptance of responsibility,<sup>72</sup> and criminal involvement in only a single aberrant act.<sup>73</sup> We have also upheld district court discretion to depart downward from Guidelines ranges enhanced by the career offender provisions<sup>74</sup> and by inclusion of relevant conduct for which the defendant was acquitted.<sup>75</sup>

### C. Upward Departures

Some Guidelines-prescribed sentences do not adequately reflect the severity of the crime committed or the aggravating nature of the offender's characteristics. *Merritt* is an example of such a situation; the fraud guideline, which was deemed to

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<sup>67</sup> *United States v. Cotto*, 979 F.2d 921 (2d Cir. 1992); *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992).

<sup>68</sup> U.S.S.G. § 5H1.4 (policy statement).

<sup>69</sup> *Maier*, 975 F.2d at 948.

<sup>70</sup> *Cotto*, 979 F.2d at 924.

<sup>71</sup> *United States v. Califano*, 978 F.2d 65 (2d Cir. 1992) (per curiam); *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992).

<sup>72</sup> *United States v. Rogers*, 972 F.2d 489 (2d Cir. 1992).

<sup>73</sup> *United States v. Ritchey*, 949 F.2d 61 (2d Cir. 1991).

<sup>74</sup> *Rogers*, 972 F.2d at 993.

<sup>75</sup> *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), cert. denied, 114 S. Ct. 163 (1993).

be the most appropriate, did not adequately reflect the heinous nature of the defendant's crime of substituting animal feed unfit for human consumption in place of powdered milk intended for famine relief.<sup>76</sup> Nor did the Guidelines range reflect Merritt's elaborate scheme to retain the benefits of his crime even after his guilty plea. In such circumstances, the district judge's authority to depart upward is manifest.

A similar example of outrageous behavior was presented in *United States v. Alter*.<sup>77</sup> There, the defendant, an executive-director and co-owner of a private halfway house under contract with the federal government, allegedly used his position to obtain sexual favors from halfway house residents in exchange for money, drugs and promises of favorable treatment. He pleaded guilty to one count of bribery.<sup>78</sup> The district judge upwardly departed after concluding that the adjusted base offense level appropriate for the single count to which Alter had pled guilty was inadequate because it did not account for three aggravating circumstances, each of which required a substantial upward departure. First, Alter's conduct was an abuse of the warden/inmate relationship; second, the incident had a "widely disruptive impact" upon the halfway house and the federal corrections system; and finally, Alter had facilitated drug abuse in the halfway house.<sup>79</sup> In a per curiam opinion, we noted that the upward departure may have been appropriate and remanded for further clarification of the district court's reasoning.

In *United States v. Bryser*,<sup>80</sup> we held that defendants' refusal to return the \$3.7 million dollars they had stolen from an armored truck permitted an upward departure from the sentencing range provided by the Guidelines.<sup>81</sup> An upward departure may also be warranted when the Guidelines sentence fails to reflect the likelihood of recidivism, whether based on

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<sup>76</sup> *United States v. Merritt*, 988 F.2d 1298, 1312 n.11 (2d Cir. 1993).

<sup>77</sup> 985 F.2d 105 (2d Cir. 1993).

<sup>78</sup> *Id.* at 107.

<sup>79</sup> *Id.*

<sup>80</sup> 954 F.2d 79 (2d Cir.), *cert. denied*, 112 S. Ct. 2939 (1992).

<sup>81</sup> Though we held as a matter of law that an upward departure was permissible, we remanded *Bryser* for resentencing because the district court had failed to make a proper finding of fact that the defendants had control over the stolen money. *Id.* at 90.

defendants' prior aggravated felony convictions<sup>82</sup> or even on nonsimilar, outdated prior convictions.<sup>83</sup>

#### D. *Other Discretion-Related Issues*

Along with clarifying the district courts' discretion to depart, we have also loosened the Guidelines' straightjacket somewhat in two other areas: section 5K1.1 motions for departure and reductions for acceptance of responsibility.

##### 1. Substantial-Assistance Motions

A court is authorized to depart below a Guidelines range where a defendant has cooperated with the government, but only upon a motion by the government under section 5K1.1 that states that the defendant has provided substantial assistance in an investigation or prosecution of another person involved in criminal activity.<sup>84</sup> In late 1992, several groups proposed amendments to the Guidelines that would give district courts authority to grant downward departures for substantial assistance absent a section 5K1.1 motion by the government.<sup>85</sup> The Commission subsequently rejected these proposals.<sup>86</sup>

Nonetheless, we have held that district courts may review the Government's refusal to file a substantial assistance motion to determine whether the refusal was based on bad faith or constitutionally impermissible motives, such as racial bi-

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<sup>82</sup> *United States v. Campbell*, 967 F.2d 20 (2d Cir. 1992).

<sup>83</sup> *United States v. Diaz-Collado*, 981 F.2d 640 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2934 (1993).

<sup>84</sup> U.S.S.G. § 5K1.1, cmt. n.1.

<sup>85</sup> United States Sentencing Commission, Sentencing Guidelines for U.S. Courts, Notice, 57 Fed. Reg. 62,832, 62,842 (amendment proposal 24; suggested by Sentencing Commission; limited to cases involving first offenders where no violence was associated with the offense), 62,848 (amendment proposal 31; suggested by Sentencing Guidelines Committee of the American Bar Association; limited to cases not governed by a mandatory minimum sentencing statute), 62,853 (amendment proposal 47; suggested by Legislative Subcommittee of the Federal Defenders; no limitations) (proposed Dec. 31, 1992).

<sup>86</sup> The Commission rejected these proposals on April 20, 1993. See Deborah Pines, *Amendments Approved to Sentencing Guidelines*, N.Y. L.J., Apr. 20, 1993, at 1 (noting that Sentencing Commission had rejected proposal allowing judges, in addition to prosecutors, to reduce sentences for defendants' substantial assistance).



as.<sup>87</sup> We recently remanded a case for resentencing where the district court erroneously accepted the government's insubstantial reasons for failing to make a section 5K1.1 motion.<sup>88</sup> In *United States v. Knights*, the government stipulated in a plea agreement with the defendant that it would make a section 5K1.1 motion on his behalf if he testified truthfully. Knights did so, but the Government refused to make the motion. Knights appealed, asserting that the government had acted in bad faith. The Government gave a number of reasons for its refusal,<sup>89</sup> all of which we held were irrelevant or frivolous except the claim that Knights's trial testimony was "inconsistent" with that of his brother. In an opinion authored by Judge George C. Pratt, we remanded the case to the district court to consider whether Knights's testimony was truthful, since if it was, the government was obligated by the plea agreement to make the section 5K1.1 motion.<sup>90</sup> *Knights*, therefore, teaches that district courts must look carefully behind a government refusal to fulfill its promise to make a section 5K1.1 motion.

## 2. Acceptance of Responsibility Reductions

Under the Guidelines, a district court has authority to reduce a defendant's base offense level up to three levels for acceptance of responsibility.<sup>91</sup> Though this reduction usually follows from a guilty plea, district courts have discretion to reduce a defendant's base offense level for acceptance of responsibility even if the defendant goes to trial.<sup>92</sup> In *United*

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<sup>87</sup> *United States v. Rexach*, 896 F.2d 710 (2d Cir.) (involving bad faith), *cert. denied*, 498 U.S. 969 (1990).

<sup>88</sup> *United States v. Knights*, 968 F.2d 1483 (2d Cir. 1992).

<sup>89</sup> The Government argued that Knights's cooperation was untimely; that he was more culpable than the co-defendant against whom he testified; that he pleaded guilty only because his brother had done so; that the plea agreement benefitted him in other ways; that the clause in the agreement that promised the § 5K1.1 motion was not "something that was bargained for;" and that Knights's trial testimony was "inconsistent" with his brother's testimony. *Id.* at 1487-88.

<sup>90</sup> *Id.* at 1488.

<sup>91</sup> U.S.S.G. § 3E1.1, 55 Fed. Reg. 19,204 (1990) (as amended effective Nov. 1, 1990), 57 Fed. Reg. 20,156 (1992) (as amended effective Nov. 1, 1992).

<sup>92</sup> *United States v. Castano*, 999 F.2d 615, 617 (2d Cir. 1993) (enforcing commentary to § 3E1.1 providing that defendant convicted by jury may receive acceptance of responsibility adjustment only where he went to trial "to assert and preserve issues that do not relate to factual guilt"); *see also* *United States v. Negron*,

*States v. Moore*,<sup>93</sup> we affirmed such a reduction where a defendant decided to go to trial rather than plead guilty, since after his arrest, the defendant promptly confessed his involvement in drug activities to authorities, family and friends. Writing for the court, Judge Ralph K. Winter stated: "[a]lthough some sentencing judges might require a greater showing of contrition, regret, or repentance, the district court was within its discretion to reduce his Base Offense Level by two."<sup>94</sup>

After last term, it is clear that district courts within the Second Circuit retain considerable sentencing discretion under the Guidelines where the individual case is sufficiently out of the ordinary. District court judges do not act as computers; indeed, they must consider the totality of offense and offender circumstances and sentence a defendant accordingly. But while the Guidelines do not eviscerate all judicial discretion, they do require a sentencing judge to articulate reasons for an exercise of discretion.

### III. THE NEED FOR EXPLANATIONS IN SENTENCING

In contrast to the current regime, a district judge in the pre-Guidelines era was "free to roam at will throughout the statutory range."<sup>95</sup> Before the Guidelines, reasons rarely accompanied the imposition of sentences.<sup>96</sup> Critics of such unbridled sentencing discretion complained about the judge's naked power to impose a sentence without any responsibility to explain the "thought guiding the discretionary arrival at a sentence of twenty-two years rather than eighteen or twelve or six and one-half."<sup>97</sup>

Today, a fundamental feature of Guidelines sentencing is the requirement that articulable reasons support each sentence: both the reasons embodied in the Guidelines provisions themselves and independent reasons to be articulated by the district court upon departure or whenever it sentences within a

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967 F.2d 68, 73 (2d Cir. 1992).

<sup>93</sup> 968 F.2d 216 (2d Cir.), *cert. denied*, 113 S. Ct. 480 (1992).

<sup>94</sup> *Id.* at 224.

<sup>95</sup> Freed, *supra* note 6, at 1697.

<sup>96</sup> *Id.*

<sup>97</sup> Frankel, *supra* note 2, at 2045.

range of two years or more.<sup>98</sup> This term, the Second Circuit remanded a number of cases where district judges either failed to make required findings or failed to provide adequate reasons for their sentencing decisions. In other cases, we clarified sentencing standards to ensure appropriate Guidelines application.

### A. *Drug Quantities*

In drug cases, base offense levels turn primarily upon the quantity of drugs involved. However, the Guidelines state that "where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the relevant amount, the court shall exclude from the [G]uidelines calculation" that amount.<sup>99</sup> To ensure accurate sentences, the Guidelines require specific district court findings regarding the relevant drug quantity whenever it is disputed.<sup>100</sup>

In *United States v. Stevens*, we remanded for the district court to consider the amount of heroin the defendant was capable of producing when we found that "[t]he sentencing court seems to have been unclear as to what quantity of heroin was negotiated and to have been preoccupied with questions other than Stevens's ability to produce as much as 500 grams."<sup>101</sup> The district court referred to the quantity at issue variously as "500 grams," "5 kilograms," and "one kilo."<sup>102</sup> With Stevens's criminal history category of III, the sentence range for each of these amounts was 97-121 months, 188-235 months, and 151-188 months, respectively.<sup>103</sup> Similarly, in *United States v. Maturo*, defendant Pontillo contended that he was incapable of importing the 25-28 kilograms of heroin ascribed to him by the government.<sup>104</sup> The district court rejected this contention, but failed to make explicit findings of fact to that effect.<sup>105</sup> Since

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<sup>98</sup> 18 U.S.C. § 3553(c) (1988).

<sup>99</sup> U.S.S.G. § 2D1.4, cmt. n.1.

<sup>100</sup> *Id.*; *United States v. Stevens*, 985 F.2d 1175 (2d Cir. 1993); *United States v. Maturo*, 982 F.2d 57 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2982 (1993).

<sup>101</sup> 985 F.2d at 1183.

<sup>102</sup> *Id.*

<sup>103</sup> U.S.S.G. ch. 5, pt. A.

<sup>104</sup> 982 F.2d at 62.

<sup>105</sup> *Id.*

there was evidence that supported both Pontillo's and the government's opposing factual assertions, we were required to remand the case for specific factual findings and consequent resentencing.<sup>106</sup>

In conspiracy cases, we have similarly held that in order to sentence a defendant based on the entire quantity of drugs involved in the conspiracy, district courts are required to make a finding that the defendant knew or reasonably should have foreseen the amount of drugs involved.<sup>107</sup>

### B. *Role in Offense*

District courts must also make specific factual findings when enhancing a defendant's sentence based on his or her role in an offense.<sup>108</sup> In *Stevens*, the district court rejected findings in the presentence report that Stevens was a middleman in the heroin conspiracy, but failed to state the factual support for its conclusion that he was an "organizer" or "leader." The court noted that the criminal organization dealt with five kilograms of heroin and, on that basis, concluded that the organization was "far from being an ad hoc type [of] thing."<sup>109</sup> In remanding the case for resentencing upon appropriate findings, we held that it did not suffice for the court to state that it had "no doubt" that Stevens exercised control over the operation without providing evidentiary support for its view.<sup>110</sup>

### C. *Conduct of Co-Conspirators*

In conspiracy cases, the Guidelines allow district judges to attribute co-conspirator conduct to a defendant at sentencing.<sup>111</sup> However, the defendant cannot be sentenced on the basis of criminal conduct of which he or she was unaware. To that effect, the Guidelines provide that when sentencing a co-conspirator under the "relevant conduct" guideline, a district

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<sup>106</sup> *Id.*

<sup>107</sup> *United States v. Lanni*, 970 F.2d 1092 (2d Cir. 1992); *United States v. Negron*, 967 F.2d 68 (2d Cir. 1992).

<sup>108</sup> *United States v. Stevens*, 985 F.2d 1175, 1185 (2d Cir. 1993).

<sup>109</sup> *Id.* at 1184.

<sup>110</sup> *Id.*

<sup>111</sup> U.S.S.G. § 1B1.3, cmt. n.1.

court may consider acts committed by co-conspirators only upon a specific finding that the defendant knew of the acts or reasonably should have foreseen that they would be committed in furtherance of the conspiracy.<sup>112</sup> The failure to make such a finding resulted in a remand in *United States v. Negron*,<sup>113</sup> in which the defendant was charged with conspiracy to distribute heroin, cocaine, and crack. He pleaded guilty to conspiracy, but contended that he was only involved with distribution of heroin. We remanded for resentencing where, over Negron's objection and attempt to withdraw his plea, the district court attributed to him the amounts of cocaine and crack seized from his co-defendants without any findings as to Negron's knowledge of crack or cocaine or whether he reasonably should have foreseen his co-defendants' possession of those narcotics.<sup>114</sup>

#### D. *Obstruction of Justice*

Under the Guidelines, when considering whether a defendant's statements amount to an obstruction of justice under section 3C1.1, sentencing judges are required to evaluate the statements "in a light most favorable to the defendant."<sup>115</sup> We held this term that this standard applies to both deceptive and non-deceptive, but nonetheless obstructionist, statements.<sup>116</sup> With respect to a false statement, the district court must determine that the defendant lied with the intent to obstruct justice.<sup>117</sup> Moreover, the Supreme Court held recently in *United States v. Dunnigan*<sup>118</sup> that in order to enhance a sentence for a perjury obstruction, the trial judge must make findings that satisfy all the elements of a perjury violation.

Non-deceptive statements, ranging from threats to witnesses to invitations to falsify testimony, may also be susceptible to various interpretations, and a sentencing judge must be satisfied that such statements were made with the intent to

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<sup>112</sup> *Id.* at § 1B1.3, cmt. nn.2(b)-(c).

<sup>113</sup> 967 F.2d 68 (2d Cir. 1992).

<sup>114</sup> *Id.* at 72.

<sup>115</sup> U.S.S.G. § 3C1.1, cmt. n.1.

<sup>116</sup> *United States v. Lew*, 980 F.2d 855 (2d Cir. 1992).

<sup>117</sup> *United States v. Cunavelis*, 969 F.2d 1419 (2d Cir. 1992).

<sup>118</sup> 113 S. Ct. 1111 (1993).

obstruct justice. For example, in *United States v. Lew*, the district court assessed an obstruction of justice enhancement based on Lew's statements to a co-conspirator that "he believed the Government had entrapped them, that they should not speak with the Government, and that they should cooperate."<sup>119</sup> The government contended that these statements constituted an invitation to fabricate a defense.<sup>120</sup> Lew argued that the statements were an attempt to warn his co-conspirator *not* to make up a story.<sup>121</sup> The district court agreed with the government, though it characterized the evidence of obstruction as a "slim reed" and admitted that it was a "close" call.<sup>122</sup> Because the statement had to be interpreted in the light most favorable to the defendant, we held that its ambiguity precluded characterizing it as an obstruction of justice, and vacated the sentence.<sup>123</sup>

#### E. *Career Offender Status*

Finally, district courts must make specific findings when determining whether cases are "related" under the career offender guidelines. The career-offender guidelines provide an enhanced sentence for offenders who have been convicted of a felony that is either a crime of violence or a controlled substance offense and who have at least two prior felony convictions of either a crime of violence or a controlled substance offense.<sup>124</sup> However, if prior convictions are "related," they will be treated as one crime and, thus, by themselves cannot provide the basis for the career offender assessment. The commentary to section 4A1.2(a)(2) defines cases as "related" if "they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing," and were not "offenses that were separated by an intervening arrest."<sup>125</sup> In *United*

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<sup>119</sup> *Lew*, 980 F.2d at 856.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 856-57.

<sup>122</sup> *Id.* at 857.

<sup>123</sup> *Id.*

<sup>124</sup> U.S.S.G. § 4B1.1.

<sup>125</sup> U.S.S.G. § 4A1.2, cmt. n.3.

*States v. Chartier*<sup>126</sup> and *United States v. Butler*<sup>127</sup> we held that, when considering the "common scheme or plan" factor, district court fact finding must include an evaluation of subjective as well as objective elements.<sup>128</sup> In *Butler*, we remanded for resentencing because the district court appeared to have concluded, as a matter of law, that robberies that took place over the span of several days could not be part of a common scheme of plan.<sup>129</sup> We observed that even unrelated crimes committed at different times, such as arson and assault, could be part of a single common scheme if both were committed to extort something of value from a single person. Thus, we required the district court to make a specific finding as to whether *Butler's* crimes were part of a common scheme or plan, or somehow otherwise related.<sup>130</sup>

## CONCLUSION

The Senate Report to the SRA states that the purpose of the Guidelines is to "provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences . . . ."<sup>131</sup> Our recent cases confirm that individualized sentences are not eliminated by the Guidelines regime; indeed, our decisions draw attention to the need to focus on offender as well as offense characteristics in imposing sentences. However, our cases continue to uphold the requirement that any individualized sentence be supported by appropriate findings and reasons.

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<sup>126</sup> 970 F.2d 1009 (2d Cir. 1992).

<sup>127</sup> 970 F.2d 1017 (2d Cir.), *cert. denied*, 113 S. Ct. 480 (1992).

<sup>128</sup> *Id.* at 1024.

<sup>129</sup> *Id.* at 1025.

<sup>130</sup> *Id.*

<sup>131</sup> S. REP. NO. 225, 98th Cong., 2d Sess. 52, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235, *cited in* *United States v. Merritt*, 988 F.2d 1298, 1307 n.3 (2d Cir. 1993).